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Introduction: Symposium on Native American Law

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SYMPOSIUM ARTICLES

INTRODUCTION

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Alexis de Tocqueville arrived on the left bank of the Mississippi at Memphis in 1831:

> It was then the middle of winter, and the cold was unusually severe; the snow had frozen hard upon the ground, and the river was drifting huge masses of ice. The Indians had their families with them, and they brought in their train the wounded and the sick, with children newly born and old men upon the verge of death. They possessed neither tents nor wagons, but only their arms and some provisions. I saw them embark to pass the mighty river, and never will that solemn spectacle fade from my remembrance. No cry, no sob, was heard among the assembled crowd; all were silent.[1]

De Tocqueville was witness to an episode in the continuing events that were to be known as the Trail of Tears.

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[1] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 340 (Henry Reeve text, rev. by Francis Bowen, 1948).

This forced removal of the native peoples from their homes in the Southeast was carried out, he wrote, "in a regular and, as it were, a legal manner."[2] The Spanish had been "unable to exterminate the Indian race by . . . unparalleled atrocities."[3] What the Spanish failed to do by atrocity, "the Americans of the United States have accomplished . . . with singular felicity, tranquilly, legally, philanthropically . . . . It is impossible to destroy men with more respect for the laws of humanity."[4]

De Tocqueville was wrong about this: Americans of the United States did not succeed in doing away with Native Americans; the tribes are very much still with us. But he was right about the role of law: law was a medium of aggression, and, in some respects, it still is.[5]

The Symposium gathered here is a wonderfully illuminating core sample of contemporary legal scholarship on the relationship between the American government and Native Americans. That it appears in this Law Review is fitting, for, although the fact tends to be overlooked, Georgia has played a constitutive role in federal

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[2] *Id.*

[3] *Id.* at 355.

[4] *Id.*

[5] The violence practiced against tribes by law—especially the current law of the Supreme Court—would be easier to understand if it were consistent and simple. It is not. *See infra* note 17 and accompanying text. Worcester v. Georgia, 31 U.S. (5 Pet.) 1 (1831), was a great and encouraging vindication of tribal sovereignty and the protections that sovereignty entailed. (Nothing came of *Worcester*. *See* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994). It was not enforced, and the Trail of Tears continued unabated.) Although that case is still good law, recent cases noted in this Symposium have departed radically from its letter and spirit. Sometimes the courts protect the tribes; most often they undermine tribal sovereignty. During some decades Congress protects the tribes, during others it assaults them.

The periodic aggression against tribes has been motivated by greed and mean-spiritedness but also by the best of intentions of "friends of the Indians." In an earlier age, the United States took tribal lands with the goal in mind of "Christianizing and civilizing" the Indians by making yeoman farmers of them; more recently, vast stretches of Alaska were taken under this generation's inspiration of turning the native people into corporation-owning capitalists. *See* Newton, *supra*, at 464-65 (describing efforts to "Christianize and civilize" Indians), 474-75 (discussing the Alaska Native Claims Settlement Act of 1971, under which all aboriginal title in Alaska was extinguished and 44 million acres were reconveyed to Alaskan Native corporations as corporate assets).

The complex, cautionary tale lies in the inconstant, well-intentioned assault on tribal sovereignty and culture.

law on the tribes. Georgia produced first *Fletcher v. Peck*,[6] the Supreme Court's initial case involving Indian interests, and then the Cherokee Cases—*Cherokee Nation v. Georgia*[7] and *Worcester v. Georgia*[8]—that, Aviam Soifer notes, "have been the bedrock of

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[6] 10 U.S. (6 Cranch) 87 (1810).

Fletcher is more widely known as the first Supreme Court case interpreting the Contract Clause. Georgia claimed ownership of the State's western territory. The corrupted legislature sold it in a transaction known as the Yazoo land fraud. Georgians sensibly threw out the wrongdoers in the next election, and the then-cleansed legislature sensibly sought to void the transaction. The Court held that the later action violated the Contract Clause. *Id.* at 136-39.

Indian interests were indirectly involved because the territory claimed by Georgia embraced Indian country. What was the status of tribal title? Chief Justice Marshall saved an answer for the last two sentences of his opinion and then employed doubletalk. The tribes west of Georgia were independent peoples who had absolute proprietorship of the soil and held a title that was judicially enforceable but was nonetheless not repugnant to state seisin in fee. *Id.* at 142-43.

The complex interrelations between Native Americans, African Americans, European Americans, and the land sold by Georgia in the Yazoo land fraud were captured in a fragment of one of William Faulkner's remarkable, organic sentences: "[T]he land which old Carothers McCaslin . . . had bought with white man's money from the wild men whose grandfathers without guns hunted it, and tamed and ordered or believed he had tamed and ordered it for the reason that the human beings he held in bondage and in the power of life and death had removed the forest from it and in their sweat scratched the surface of it to a depth of perhaps fourteen inches in order to grow something out of it which had not been there before and which could be translated back into the money he who believed he had bought it had had to pay to get it and hold it and a reasonable profit too: and for which reason old Carothers McCaslin, knowing better, could raise his children, his descendants and heirs, to believe the land was his to hold and bequeath since the strong and ruthless man has a cynical foreknowledge of his own vanity and pride and strength and a contempt for all his get: just as, knowing better, Major de Spain and his fragment of that wilderness which was bigger and older than any recorded deed: just as, knowing better, old Thomas Sutpen, from whom Major de Spain had had his fragment for money; just as Ikkemotubbe, the Chickasaw chief, from whom Thomas Sutpen had had the fragment for money or rum or whatever it was, knew in his turn that not even a fragment of it had been his to relinquish or sell . . . ." WILLIAM FAULKNER, *The Bear*, *in* THREE FAMOUS SHORT NOVELS 244-45 (Vintage Books ed., 1961).

[7] 30 U.S. (5 Pet.) 1 (1831).

[8] 31 U.S. (6 Pet.) 515 (1832). Between *Fletcher* and the Cherokee Cases, the Court decided two other cases involving Indian interests. In New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812), the Court found that a tribe's exemption from taxation ran to purchasers of their land and could not be voided. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), gave Chief Justice Marshall the opportunity to elaborate on his equivocal statements in *Fletcher* about Indian title. The medium for his attempt at clarification was the arcane doctrine of discovery. His opinion and the doctrine have invited considerable misunderstanding. Joseph Singer's analysis of *Johnson* is accurate, apt and clarifying. *See* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 489-94 (1994).

American Indian law for over 150 years."[9]

Recently Georgia revisited the events that gave rise to the Cherokee Cases. The State Board of Pardons and Paroles, some 160 years later, pardoned Samuel Worcester and Elihu Butler, the *Worcester* missionaries.[10] The pardon reads very like a confession of sin. After paying tribute to the Cherokee and their "high order of civilization long before any English colonists arrived," it recites the events leading to the arrests of Worcester and Butler and the immediate aftermath, including the Supreme Court's decision and Georgia's refusal to obey.[11] The conclusion states that the Board acted in order "to remove a stain on the history of criminal justice in Georgia."[12] In an interview, the Chairman of the Board added the explanation that the Trail of Tears was "one of our government's most inhumane acts," that the pardon righted "one of many wrongs against the Cherokee Nation," and that he wished "there could be a pardon for the state's action."[13]

For all that it is inadequate and long overdue, this symbolic gesture constitutes a start—and a symmetrically just one at that. Georgia provided occasion for the Supreme Court's first, fundamental law on the tribes; it is only right that official reckoning with "inhumane acts" against them should now find occasion in this state as well.

Georgia's example in beginning to confront its treatment of indigenous people was soon followed by Congress. James Anaya's contribution to this Symposium opens by noting that, in 1993, 100 years after its illegal overthrow of the Kingdom of Hawaii, the United States acknowledged the wrongfulness of its aggression

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[9] Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 540 (1994).

The frequency of citation to the Cherokee Cases in this Symposium confirms their original and continuing importance. *See, e.g.*, P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 368 n.5 (1994); Newton, *supra* note 5, at 462 nn.33-36; Singer, *supra* note 8, at 490 n.54, 491 n.56, 494 nn.77-80.

[10] State of Georgia, Board of Pardons and Paroles, Pardon, Sept. 15, 1992; *see also Missionaries Pardoned for 1831 "Crimes,"* GEORGIA PAROLE REV., Fall, 1992, at 1.

[11] State of Georgia, Board of Pardons and Paroles, Pardon, Sept. 15, 1992.

[12] *Id.*

[13] *Missionaries Pardoned for 1831 "Crimes," supra* note 10, at 8.

against native Hawaiians and apologized to them.[14] There is a Georgia connection to this official honesty. Although Georgians may have forgotten, many native Hawaiians remember that it was a former Georgia congressman, James Blount, who first officially identified the United States' complicity in the lawless overthrow of the lawful, peaceful government of Hawaii. President Grover Cleveland appointed Blount as his special representative to investigate the events in Hawaii shortly after they had taken place. Blount's subsequent report was clear and straightforward: the United States was to be blamed.[15] Congress has now subscribed to his view.

Neither Congress's confession and apology nor Georgia's pardon issued in any measurable benefit to native peoples, but both will have done the non-Indian majority some good if they prompt further, meaningful governmental reckoning with our past—and our present.[16] The present and present responsibility are at issue. Although it is not so evident in Georgia, in other parts of the country, it is increasingly clear just how contemporary and pressing relations with the tribes can be. Tribal casinos, land claims, native religious practices, museum holdings, economic development of Indian country, tribal fishing rights, and politics have brought U.S.-tribal relations to the fore. The past figures in these relations inasmuch as misuses of history bar progress.

Georgia and Congress have begun to get their history straight; the courts have not, or they have not done so consistently.[17] Aviam Soifer's *Objects in Mirror are Closer Than They Appear*[18] and Joseph Singer's *Well Settled?: The Increasing Weight of History*

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[14] S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 309-11 & n.1 (1994).

[15] GROVER CLEVELAND, PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. DOC. NO. 47, 53d Cong., 2d Sess. XVII (1893) (enclosing Blount Report).

[16] "[A]fter longstanding neglect, the United States Congress with good reason has turned its attention to the past and present of the Native Hawaiian people." Anaya, *supra* note 14, at 319.

[17] Nell Newton observes that "outrageous self-serving justifications for seizing Indian land and destroying tribalism have alternated with frank acknowledgement of the wrongs done to Native Americans and the moral duty to make amends." Newton, *supra* note 5, at 458. History teaches that Georgia's and Congress's recent, positive turns to the past may be impermanent.

[18] Soifer, *supra* note 9.

in American Indian Land Claims[19] explore the judicial habit of inventing a past and then ascribing to it responsibility for the courts' own, present aggressions against the tribes.[20]

Soifer's eloquent scholarship delineates how judges "make claims from history, while blithely remaining blind to the crucial understandings at the confluence of memory, meaning, and historical accuracy."[21] Singer gives an attentive reading to *State v. Elliott*,[22] a 1992 case in which the Vermont Supreme Court struck a blow against Abenaki property rights. It is a remarkable study. The author peels off each layer of the opinion—citation to precedent by citation to precedent, legal assertion by legal assertion, historical claim by historical claim—and finds at the center nothing but a modern defeat of the Abenaki by a court that attempts to "rewrite history by pretending that conquest happened long ago in the past rather than recently—or even in 1992 as consequence of [the court's] own actions."[23]

Singer thus raises the issue of judicial compliance "in the continuing conquest of American Indian nations."[24] Nell Newton has addressed this painful subject before,[25] and she touches on it again here.[26] The chief medium of judicial complicity—Newton, Singer, and Soifer help the reader understand—is the abuse of both the nation's history in general and the Supreme Court's case

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[19] Singer, *supra* note 8.

[20] Nell Newton observes that those who assume tribes' complaints all deal with ancient claims fail to realize that "[l]and has been taken from Indian tribes since World War II." Newton, *supra* note 5, at 473.

[21] Soifer, *supra* note 9, at 534.

[22] 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[23] Singer, *supra* note 8, at 529.

[24] *Id.* at 532.

[25] In Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), the Supreme Court outrageously proposed: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land." *Id.* at 289-90. On this basis—a fictional past conquest of native people—a real present taking by the United States of property belonging to the Tlingit Tribe in Alaska did not require compensation under the Fifth Amendment. Newton observed about *Tee-Hit-Ton*: "The only sovereign act that can be said to have conquered the Alaska natives was the *Tee-Hit-Ton* opinion itself." Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980).

[26] *See* Newton *supra* note 5, at 457-58, 461, 466-67.

history in particular, especially the early case history. Mark DeWolfe Howe once remarked that "a great many Americans—lawyers and non-lawyers alike—tend to think that because a majority of the justices [of the Supreme Court] have the power to bind us by their law they are also empowered to bind us by their history."[27] Happily, as Howe pointed out, we are free to find our "history in other places than the pages of the *United States Reports*."[28] Unhappily, although the courts may bind *us* by their law, they do not feel themselves bound by it and often find their law in places other than the pages of prior decisions like *Worcester*.

The abuse of history as a way of abusing tribes is only one of the themes sounded in this Symposium. Another is the international aspect of U.S.-tribal relations. Anaya's *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*[29] is a thoughtful, ground-breaking study of the rights of Native Hawaiians to self-determination under the developing body of international norms concerning indigenous peoples. And P.S. Deloria and Robert Laurence draw guidance from an analogy between international and tribal-state negotiations in their *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*.[30]

These two articles bring international law to bear on developments within the United States; Nell Jessup Newton's article asks whether Native Americans' experience may have meaning abroad for East Europeans seeking restitution of property seized under Communist regimes. Her thoughtful, learned analysis in *Compensation, Reparations, & Restitution: Indian Property Claims in the United States* leads to the answer that Indian tribes whose property has been confiscated share some similarities with East European claimants. She hypothesizes that the advice of the former for the latter is to beware of "unduly legalistic procedures that might enrich attorneys more than landowners."[31] Newton

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[27] MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5 (1965).

[28] *Id.*

[29] Anaya, *supra* note 14.

[30] Deloria & Laurence, *supra* note 9, at 397-98.

[31] Newton, *supra* note 5, at 479.

adds, however, that there is no exportable lesson to be learned from the history of singling out tribes "to bear the burden of providing for the public good by losing their land. . . . While many different groups suffered first from the Nazi and [then] communist regimes, it was American Indian tribes alone who provided the land needed to create the wealth of the United States."[32]

Any connection of U.S.-tribal relations to international or comparative law exposes the foundational dilemma of sovereignty as between American Indian nations on the one hand and, on the other, the United States and the several states. Soifer's analysis of the Supreme Court's 1991 opinion in *Blatchford v. Native Village of Noatak*[33] will lead readers to see that tribes are treated as foreign nations or not depending on which accords them the greatest legal disadvantage.[34] And, as Deloria and Laurence point out in their creative, helpful study, the enforcement of tribal judgments off reservation and of state judgments on reservation—full faith and credit—makes tribal sovereignty a matter of vital, practical importance to ordinary business on Indian reservations.[35]

Their proposal for resolution of full faith and credit conflicts contributes to another theme that emerges from this Symposium: the future of U.S.-tribal relations. The symposiasts' concern for honest confrontation with the past translates as concern for the future. Deloria and Laurence spy hope in negotiations between states and tribes. Their vision is all the more singular because its emphasis falls on talks between the judicial rather than the executive or legislative branches of state and tribal government. Anaya, too, endorses negotiation as the preferred procedure for the future development of remedial measures among indigenous people like Native Hawaiians: "Negotiations involving truly representative leaders of indigenous peoples provide a potential framework for the voices of indigenous communities to be heard and their

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[32] *Id.*

[33] 111 S. Ct. 2578 (1991); *see* Soifer, *supra* note 9, at 536-43.

[34] Scholarly, well-grounded hope for tribal rights is to be anticipated from Soifer's KEEPING COMPANY: THE SUBSTANCE OF PLURALISM IN AMERICAN LAW AND HUMANITIES (forthcoming, Harvard University Press).

[35] Deloria & Laurence, *supra* note 9, at 367-68.

preferences to be realized."[36] And Joseph Singer finds that not the least fault of the Vermont Supreme Court in the *Elliott* case on Abenaki land rights was its failure "to recognize that the most likely and most appropriate resolution to the case would have been a negotiated and ultimately legislative one" that resulted in a treaty.[37]

Now if I were a Native American I would greet proposals for negotiation—especially those floated in the legal academy—with bitterness and deep, abiding suspicion painfully wrung from memories of past negotiations with Americans. I would remember the Trail of Tears and subsequent trails, littered with negotiated agreements, broken promises, treachery, and terrorism like the slaughter of innocents at Wounded Knee. Even so, the United States and Indian tribes have an unavoidable future together, and, if not through good faith negotiation, how else will they realize a future that recognizes "property rights and sovereignty on both sides"?[38]

James Anaya refers to the modern world's "multiple patterns of human association and interdependency."[39] We must keep our communities and the multiplicity of communities—their independence and their interdependence—in the face of opposition by atomizing economic, ethnic, religious, racial, and political force in the post-Cold-War world. The United States and the tribes have the opportunity to make a joint contribution: positive experiments in learning to live together differently. Prerequisite to success is American will to acknowledge that Native America—as understood by Native Americans—is a valid, different reality and that it is to be lived with in this land on terms of equal dignity.

The solemn spectacle that would not fade from de Tocqueville's remembrance cannot fade from ours. "No cry, no sob, was heard among the assembled crowd; all were silent."[40] That haunting silence has yet to be justly attended. The judgment it contains waits to be discerned and reckoned with. We Georgians are beginning to listen.

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[36] Anaya, *supra* note 14, at 362.
[37] Singer, *supra* note 8, at 531.
[38] *Id.*
[39] Anaya, *supra* note 14, at 324.
[40] TOCQUEVILLE, *supra* note 1, at 340.

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The Symposium includes Native American as well as American authors. All are leading scholars: Newton, Deloria, Anaya, and Laurence in American Indian law; Soifer in legal history and jurisprudence; Singer in property and legal theory. That professionals of such distinction have responded to the invitation of the Law Review confirms the modern importance of the subject. That two of them come from other fields of expertise confirms the subject's relevance to legal studies in general. Such confirmations constitute a new departure in the legal academy.

Gifts of hope are not to be despised when they are given. Readers will join me in giving thanks for this Symposium, its authors, and the hard work of editorial excellence in publishing it.